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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 568.

UNITED GAS PIPE LINE COMPANY,

Petitioner,

v.

MISSISSIPPI RIVER FUEL CORPORATION AND FEDERAL POWER COMMISSION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF OF RESPONDENT MISSISSIPPI RIVER FUEL CORPORATION IN OPPOSITION.

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November 20, 1957.

No.

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Opinions Below.

The opinions below are not yet reported. The original opinion appears at pages 1a-17a and the supplemental opinion appears at pages 18a-21a of the Appendix to the Petition.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented.

1. Whether the Court below was justified in remanding to the Federal Power Commission a rate determination under the Natural Gas Act on the ground that there was not adequate substantiation of prices paid to a 100% affiliated producing company which also was a natural-gas company but had not filed its rates when both affiliates were considered as one and when no justification was shown for the prices beyond a mere listing of other area prices and when the Court below had ruled in *City of Detroit* v. *F. P. C.*, 230 F. 2d 810 (D. C. Cir. 1955), *cert. denied*, 352 U. S. 829, that some justification beyond prices paid to others must be shown to realize more than costs determined upon conventional rate base methods.

2. Whether there was properly before the Court below under §19(b) of the Natural Gas Act the question of the allowance of the full price paid to an affiliate when in the application for rehearing to the Commission, the Petitioner below challenged "the unquestioned acceptance of prices paid" by the natural-gas company to nonaffiliated producers as a test for determining the allowance for gas purchased from such affiliate and where such grounds were carried forward to the Petition for Review.

Statute Involved.

The pertinent provisions of the Natural Gas Act (52 Stat. 821 as amended; 15 U. S. C. §717 *et seq.*) are set forth at pages 22a-26a of the Appendix to the Petition.

Statement.

This case involves, in the words of the Court below, the "situation [where] there are several important factors not ordinarily present" (App. 19a[1]). The Petitioner is a natural-gas company. It buys a substantial amount of the gas which it sells in interstate commerce for resale from Union Producing Company ("Union"). Petitioner and Union have a common parent which owns 100% of each.

Union is also a natural-gas company as apparently conceded by the Petitioner[2], although, until after the instant

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[1] In this opposition brief, Respondent, Mississippi River Fuel Corporation, adopts the references in the Petition, i.e., the record certified from the Court below will be referred to as "R"; the Appendix to the Petition is referred to as "App."

[2] Counsel for Respondent have been advised by letter dated October 28, 1957, from Counsel for Petitioner as follows:

> "With reference to United Gas Pipe Line Company's petition at p. 3 line 11 where the words '(*not* a natural gas company)' appear with reference to Union Producing Company, we have just been informed that Union Producing Company has given notice to the Commission of its intention to file with it rates as an independent producer within the next few days, and therefore ask you to ignore the words quoted which may be deemed stricken."

In addition, on November 6, 1957 the Commission issued an order at its Docket G-10060 which was a show cause proceeding against Union and Petitioner in regard to Union's failure to file its rate schedules. In such order of November 6, the proceeding was postponed, the Commission reciting:

> "Union, on November 4, 1957, filed its answer to the aforesaid order to show cause. It states that upon full consideration of the order it decided to comply therewith and to file with the Commission Union's schedules of rates and charges for the sale of natural gas subject to the jurisdiction of the Commission. Likewise, Union states, it has decided to file the necessary applications for certificates of public convenience and necessity for operations and facilities subject to the jurisdiction of the Commission. The filings were tendered on October 31, 1957, and are in process of analysis by the staff of the Commission."

Petition was filed, contrary contentions had been made in respect to Union's status.

Throughout the period covered by this case (this being a refund case covering a past period only), Union had no rate tariff on file with the Federal Power Commission covering sales to United. The Court below held that in determining the reasonableness of the price paid by United to Union, the corporate fiction should be disregarded.

Respondent, Mississippi River Fuel Corporation ("Mississippi"), buys from Petitioner a substantial part of its natural gas supply which it in turn sells directly for consumption and for resale. During the course of the proceedings before the Commission and its Examiner, Respondent, Mississippi, had contended that the price to be allowed to Petitioner on its purchases of gas from its 100% affiliate, Union, should be the subject of some inquiry as to fairness. In apparent answer to this contention the Staff of the Commission introduced evidence which Petitioner accepted on its own behalf. This evidence was introduced mainly through two Staff witnesses. The first presented exhibits containing a cost of service study and testified that the price of the gas purchased by Petitioner from Union was on the basis of prices in force July 31, 1954 (R. 65). In being questioned as to the details of the prices this witness was unable to explain how they were arrived at and conceded that he had not done the work in compiling the prices (R. 66-67). He stated that the work papers upon which the prices were arrived at were prepared by the Company and the Staff of the Commission received them for the purpose of checking the contract prices and that this had in fact been done by another Staff man (R. 67). The fact that this first witness had not done the actual pricing work was conceded by Counsel for the

Commission Staff (R. 69). A second witness was then produced to testify in respect to the pricing of the gas (R. 69-70). This second witness gave the evidence upon which the Commission was later to justify the prices allowed, *vis-a-vis* Petitioner and Union. This witness merely took the prices which Petitioner paid in various areas of supply and entered these upon his work papers (R. 102-105). This represented the sum total of the comparison of the prices paid by Petitioner to Union and their justification for use by the Commission. The Examiner and the Commission sanctioned the use for the purposes of these rate proceedings of the prices paid by Petitioner to its 100% affiliate Union, even though it was shown that such prices allowed included increases which Petitioner gratuitously offered to Union (R. 322-326).

Respondent, Mississippi, petitioned for rehearing of the Commission decision claiming *inter alia* as follows (R. 955):

> "Any adequate protection of the public interest present here and in other rate making proceedings requires something more than the unquestioned acceptance of prices paid by the same purchaser to nonaffiliated producers as a sufficient test for the determination of value of the gas purchased from Union.
>
> "The Examiner in his Decision approved by the Commission admits that the *Panhandle* method was not used by United, the Staff, or by the Examiner. The sole test was whether the prices paid by United to Union were above the prices paid by United to nonaffiliated producers.
>
> "If a proper record is to be made to support the final rates recommended by the Examiner and approved by the Commission herein, additional evidence as to the 'fair field,' 'market,' or 'commodity

value' for Union produced gas must be introduced in these proceedings."

The Respondent, Mississippi, in its petition for review in the Court below averred the following:

"(1) The Commission erred in allowing in full in United's cost-of-service the gas purchase costs represented by United's purchases from Union Producing Company, a 100% affiliate of United, in certain major Northern and Gulf Coast Area gas fields.

"(2) The finding that the prices paid to Union Producing Company, a 100% affiliate of United, under contracts not made as a result of arm's length bargaining were proper, fair and reasonable is not supported by substantial evidence and is against the weight of the evidence.

"(3) The finding that the prices paid to Union Producing Company, a 100% affiliate of United, under contracts not made as a result of arm's length bargaining, were fair, just and reasonable because they were not above prices paid to nonaffiliated producers is not supported by substantial evidence and is against the weight of the evidence."

The Court below reversed the Commission on allowing the prices paid by Petitioner to Union on the ground that the mere comparative prices used to justify this allowance was not a sufficient test. After pointing out that there are "several important factors not ordinarily present in this case", the Court below stated that the transactions between Petitioner and Union were not at arm's length and, in view of the peculiar corporate relationship existing, the Court pierced the corporate veil and treated Union and Petitioner as one. By so doing the Court below brought the case squarely within the requirements which it had prescribed in *City of Detroit* v. *Federal Power Commission*, 230 F. 2d

810 (1955), where weighted average arm's length prices were used by the Commission to justify the price for a natural gas company's own production and where the Court below remanded because sufficient evidence to justify such pricing method was absent. This Court denied *certiorari*. 352 U. S. 829.

ARGUMENT.

I.

There is no important Federal question.

The facts in the instant case clearly demonstrate that the Court below did not impinge upon any delicate area of the administrative tribunal, *vis-a-vis*, the reviewing court. In reality, the Court below acted upon an administrative determination unsupported by substantial evidence of record.

Even the most casual reading of the opinion below will demonstrate that fact. For instance, in speaking of the price allowed on account of the purchases from Union, the Court stated:

> "A mere comparison of such prices with prevailing prices would not sufficiently justify the transactions" (App. 19a).

Again the Court below held:

> "We rejected this use of the field price [in *Detroit*], because the Commission record did not show that such an allowance was reasonably necessary to serve any stated ends of the Natural Gas Act. A 100 per cent affiliate stands in the same position as does the integrated producing 'arm' of a pipeline company. Under the doctrine of the *City of*

> *Detroit* case United could not, on the record as it is now before us, use as costs the fair field price of gas produced by its affiliate, Union; a reconsideration by the Commission under the principles laid down in that case would be necessary" (App. 19a-20a).

And again:

> "To be included in United's costs, increases in the interaffiliate prices must have some factual economic justification * * * we do say that the whole of such benefits, as measured by increasing field prices, cannot be assigned to the stockholders by unexamined increases in the interaffiliate prices accepted as costs of the affiliate-purchaser" (App. 20a-21a).

It is apparent that the Court below performed a prime reviewing function, *i.e.*, it remanded because of the lack of substantial evidence to sustain the Respondent Commission's finding on the price allowed Petitioner for the interaffiliate purchase. This clear duty of a reviewing court has long been recognized and is clearly spelled out in 19(b) of the Natural Gas Act:

> "The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

It is clear, therefore, that the Court below did not substitute its judgment for that of the Commission. It did no more than declare that the record did not support a Commission finding. Having exposed the error, the remainder was properly left to the Commission in the following words:

> "We do not hold that a full-blown inquiry into the rates of Union is necessary. Subsequent developments in the proceeding may or may not indicate such a necessity" (App. 21a).

II.

Petitioner seeks reversal of this Court's previous denial of certiorari in the *Detroit* case.

In essence Petitioner seeks review of *City of Detroit* v. *F. P. C.* where this Court denied *certiorari* in 352 U. S. 829. The only difference between *Detroit* and the instant case which Petitioner points to is the contention, adopted by the Commission, that the comparative prices were of higher stature than those involved in *Detroit* (Petition, p. 13). This apparent difference, however, is purely illusory since in *Detroit* the Court below expressly accepted "as supported by substantial evidence the findings of the Commission regarding the weighted average arm's length prices paid at the wellhead." 230 F. 2d at 814. The quality of the comparative price used in *Detroit* was not the reason for the remand in that case.

The Court below in the instant case treated Union as Petitioner's producing arm. Having done so, the Court then went directly to and imposed the requirements of *Detroit*. Petitioner recognizes this when it states (Petition, p. 12):

> "The Court below directed the Commission to make a new inquiry under the 'same course of reasoning' it followed in *City of Detroit* v. *Federal Power Commission* (1955 D. C. Cir.) 230 F. 2d 810, cert. den. 352 U. S. 829 * * *."

Petitioner claims for its cause the basis used for pricing Union's gas. It claims a high degree of reliability for such prices which the evidence does not support. The evidence shows that the prices used to justify the allowance to Petitioner were those paid by Petitioner for its total supply. Any increase in price which Petitioner gave to an unaffiliated supplier it gratuitously undertook to pay Union.

The evidence is clear that there was no critical appraisal of comparative prices but instead the prices paid to all suppliers were listed and the mere listing of prices no lower than those paid to Union was taken as justification for the allowance on the interaffiliate sales. This was tantamount to allowing on this meager basis, Petitioner a price which it paid to others. Thus *Detroit* was directly in point and was dispositive of the issue.

III.

Respondent, Mississippi, did effectively preserve the point upon which the Respondent Commission was reversed.

Petitioner contends that the point upon which the Court below reversed the Commission was not adequately preserved in the application for rehearing as required by §19(b) of the Natural Gas Act. The policy of such requirement is that an administrative agency should be apprised of the question presented upon review, i.e., notice. It is readily apparent from the record that such notice was given. This Court in *May Department Stores Co.* v. *N. L. R. B.*, 326 U. S. 376, expressly applied the test of whether an ". . . objection was specifically sufficient to apprise the Board of the question now presented". With this policy in mind we must refer to a portion of the application for rehearing addressed to the Commission which Petitioner does not quote wherein Respondent, Mississippi, stated:

> "Any adequate protection of the public interest present here and in other rate making proceedings requires something more than the unquestioned acceptance of prices paid by the same purchaser to nonaffiliated producers as a sufficient test for the determination of value of the gas purchased from Union."

This directly comports with the statement of the point upon which the Court below reversed, i.e. the Commission's allowance as a cost of service of the full price paid for gas by Petitioner to its 100% affiliate, Union. Indeed, to carry the contention of the Petitioner to its logical conclusion would mean that a party to an appellate proceeding may be foreclosed from citing the latest judicial pronouncements upon the ground for which review is invoked. Analysis will indicate that Petitioner objects to the fact that at the time the administrative proceedings had been completed the determination of the Court below in *Detroit* had not yet issued. The *Detroit* case, however, like the instant case, dealt with the allowance in the cost of service for produced gas. Matching this fact with the fact that Respondent, Mississippi, had averred that the protection of the public interest in the instant proceedings required more than the unquestioned acceptance of other prices, indicates a clear anticipation of the *Detroit* ruling, or at least in total required an exact adherence to the Commission's ruling, giving rise to the *Detroit* review.

In any event there was a precise exception to the Commission's treatment of the cost to be allowed to Petitioner on account of its acquisition of gas from its 100% affiliate. Certainly the Commission was not taken by surprise by what the Court did. Nor was it taken by surprise in the light of the rehearing application since the point in substance at least was expressly made to the Commission before the *Detroit* case issued. The opinion in *Detroit* did issue on December 15, 1955—eight days after the application to the Commission for rehearing but three weeks before the Commission's Order denying rehearing. It is apparent that the conclusion of the Court below that:

> "The Petitioner's [Respondent, Mississippi's] application for rehearing specifically included this

point. We do not read *Federal Power Comm'n* v. *Colorado Interstate Gas Company*, 348 U. S. 492, 99 L. Ed. 583, 75 S. Ct. 467 (1955) as requiring that the application for rehearing cite every case relied upon before the Court of Appeals."[3]

is correct.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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[3] Significantly one of the panel which decided the instant case in the Court below was the Honorable Warren Burger, who, as Assistant Attorney General, had successfully urged the point involved in the *Colorado Interstate* case. Certainly he must have been aware of the issue now posed by Petitioner as a ground for granting certiorari.